*Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) *with Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Hence, the determination of whether the plaintiff has asserted a violation of a constitutional right at all is a necessary concomitant to the threshold immunity question. See, *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Because the Petitioner fails to separate the analysis of the deprivation of a constitutional right from the analysis of the qualified immunity issue, the Petitioner erroneously concludes that a trial court faced with plaintiff's evidence of the retaliatory motive of the individual defendants must deny the individual defendants qualified immunity.

The Petitioner's erroneous analysis of the applicable legal standard demonstrates that this case is not an appropriate vehicle for this Court to clarify *Crawford-El*. In this case, the Trial Court, Ponsor, J., found that a reasonable jury could determine that the individual defendants had committed a constitutional tort against the Petitioner. However, the Trial Court properly went on to evaluate the qualified immunity issue assuming that the individual defendants had committed a constitutional tort. Petition, App. D, 32a.

When the Trial Court, Ponsor, J., evaluated the qualified immunity issue, it found that "the individual defendants, in disciplining [the Petitioner] were acting pursuant to departmental regulations, codified by [the Petitioner] himself when he was chief, that on their face authorized the actions they took." *Ibid*, at 34a. The simplest explanation for the allowance of the individual defendants' motions for summary judgment is that the Petitioner failed to demonstrate the existence of a genuine issue of material fact with respect to the reasonability of the decisions of the individual defendants. Fed.R.Civ.P. 56(c).

The record before this Court does not permit the Petitioner to contest that explanation. Therefore, the Trial Court, Ponsor, J., properly allowed the individual defendants' motions for summary judgment on the basis of qualified immunity. *Ibid*

Even if one were to accept the Petitioner's premise that the Trial Court, Ponsor, J., should have denied the individual defendants' motions for summary judgment on the basis of qualified immunity, the error was harmless. The error was harmless because the jury's verdict demonstrates that none of the individual defendants acted against the Petitioner with improper motive. The matter went to the jury against the City of Holyoke on the following issues: violation by the City of Holyoke of Petitioner's civil rights by retaliation through adverse employment action; and, violation by the City of Holyoke of Petitioner's civil rights by retaliation through severe harassment. The matter went to the jury against the individual defendants for malicious and intentional interference with contractual relations; and, for intentional infliction of emotional distress. *Special Verdict Form*, App. 13, at 14. The jury found against the Petitioner on his civil rights claim grounded in retaliation through adverse employment action; and for the Petitioner on his civil rights claim grounded in retaliation through severe harassment. However, the jury also found against the Petitioner and for each of the individual defendants on Petitioner's claims for intentional interference with contractual relations and intentional infliction of emotional distress. *Ibid*, at 14.

From this verdict, one may infer that the jury found that none of the individual defendants intended to harass the Petitioner or to maliciously and intentionally interfere with the Petitioner's contractual relations with the City of

Holyoke. Therefore, the defendants did not intend to deprive the Petitioner of his civil rights through adverse job actions. Furthermore, even though the jury found for the Petitioner on his claim that he had been deprived of his civil rights by reason of severe harassment, the jury awarded the Petitioner nominal damages of one dollar. Thus, on these facts, analysis of the qualified immunity issue becomes a sterile and abstract exercise unworthy of this Court's attention. For this reason alone, the Petition should be denied.

## II.

The Petitioner argues that this Court should review the instant case because the First Circuit Court of Appeals has created a more rigorous standard for the evaluation of qualified immunity than this Court permits. The Petitioner builds his argument upon the sand of a sentence fragment taken out of context from the decision in *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 71 (1st Cir. 2002). Petition, App. A, at 6a. The Petitioner ignores the plain language of the First Circuit's opinion in this case: "[Q]ualified immunity protects government officials who engage in unconstitutional conduct so long as that 'conduct does not violate clearly established . . . constitutional rights *of which a reasonable person would have known*.'" (Emphasis supplied.) *Ibid* Petitioner also ignores the plain language of the *Dirrane* decision: "Under section 1983, a government employee is immune to damages where a reasonable official could believe (the test is objective), albeit mistakenly, that his conduct did not violate the First Amendment. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Immunity exists even where the abstract "right" invoked by the plaintiff is well-established, so long as the

official could reasonably have believed "on the facts" that no violation existed. *See Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 90 (1st Cir. 2002); *Swain v. Spinney*, 117 F.3d 1, 9-10 (1st Cir. 1997)."

The First Circuit has adopted and implemented the very test this Court mandated. It has not established a more rigorous test. No conflict exists between the decisions of the First Circuit and this Court's decisions. Therefore, this case is not an appropriate vehicle to clarify the perimeter of the *Harlow* test, so that the Petition should be denied.

## III.

The Petitioner argues that the First Circuit's decision in this case conflicts with the implicit holding of this Court in *Crawford-El*. Petition, 20. That argument lacks foundation. The argument assumes that neither the Trial Court, Ponsor, J., nor the First Circuit scrutinized the intent of the individual defendants. That assumption arises from the Petitioner's misapprehension that the third prong of the qualified immunity analysis (whether a similarly-situated, reasonable official would have known that he or she had committed a constitutional violation) rests upon the subjective intent of the defendant. Petition, 20. In fact, the intent of the defendant becomes relevant to the first prong of the analysis, that is, whether a constitutional violation had occurred. The First Circuit had understood and applied that distinction before its decision in this case. *Mihos v. Swift*, 358 F.3d 91, 103 (1st Cir. 2004). Thus, the Petitioner has failed to demonstrate a conflict between the analytical framework the First Circuit employs and that which this Court established in *Crawford-El*. As a result,

this case does not require further review. The Petition should be denied.

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

*Of Counsel*
HARRY L. MILES
GREEN, MILES, LIPTON & FITZ-GIBBON, LLP
77 Pleasant Street
P. O. Box 210
Northampton, MA 01061
(413) 586-8218

JOHN C. SIKORSKI
DOROTHY VARON
ROBINSON DONOVAN, P.C.
1500 Main Street, Suite 1600
Springfield, MA 01115
(413) 732-2301

JOHN H. FITZ-GIBBON,
*Counsel of Record*
GREEN, MILES, LIPTON & FITZ-GIBBON, LLP
77 Pleasant Street
P. O. Box 210
Northampton, MA 01061
(413) 586-8218

*Counsel for the City of Holyoke, Massachusetts, Daniel Szostkiewicz, Marc Courneyor and Stephen Donoghue*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**
**WESTERN SECTION**

**Docket no. CA 98-30170-MAP**
**Springfield, MA**

**May 21, 2003**

ROBERT WAGNER )
v. )
CITY OF HOLYOKE, et als. )

**TRANSCRIPT OF EVIDENTIARY HEARING HELD**

BEFORE THE HONORABLE MICHAEL A. PONSOR,
UNITED STATES DISTRICT COURT JUDGE

* * *

(Testimony of Stephen Donoghue)

* * *

[100] gone to the Attorney General's office?

A. I think on the phone by Paquette when he was excerpting some of those Valley Advocate articles to me while I was on vacation, I may be wrong, but I think that's when I first learned of it on the phone, but no sooner than that.

Q. That would be February of 1997?

A. That would be February 1997.

Q. All right. Now, if an officer has evidence of wrongdoing within the department, how is that officer supposed to handle that information?

A. I would suggest you go to your immediate supervisor. That's what you're supposed to do. That's what the rules and regulations say.

Q. All right. And if the immediate supervisor does not provide a satisfactory response, what's the next step?

A. Just tell him he wants to see the next man up the line.

Q. And how about if the immediate supervisor is the source of the problem?

A. Tell him I want to see the chief.

Q. Is the chief the next step?

A. I would say that's – within house that's the extent of the step. If he wants to see the mayor, he can just tell the chief I want to see the mayor.

[101] Q. That's part of the chain of command?

A. That's part of the chain of command.

Q. So it goes supervisor to the chief?

A. Well, supervisor – if he tells the sergeant, the sergeant should refer him to the shift commander, the lieutenant or captain. The captain should – if he's not happy with the captain, he wants to see the chief, if he's not happy with the chief, he can see the mayor. If he doesn't get satisfaction there, then he might want to go to the district attorney or attorney general if he thinks something is seriously wrong. But if it's just an in-house thing, I think it stops with the mayor.

Q. Now, did that chain of command play any role in your disciplines regarding the Valley Advocate disciplines?

A. Yes, it did.

Q. What role did it play?

A. I think that the chain of command and organizational integrity, it's imperative that it be adhered to by the chain of command in the good order and effective functioning of the organization.

Q. And when did the officer have a right to go to the press, for example?

A. I would say – to the press?

Q. Yes.

A. I would think that according to the rules and [102] regulations, unless he's a designee of the chief, that he doesn't have a right to go to the press.

Q. But he goes up the chain and goes to the mayor.

A. He goes to the mayor.

Q. Then can he go to the press?

A. I would think not without being subject to discipline.

Q. Now, let's talk about some of the disciplines that you imposed. The CP supervisor reassignment, that was in February of 1997?

A. Yes, it was.

Q. How did that come about?

A. It came about before I went to Florida. I told Captain McCoy that I had been getting a lot of complaints from the tenant representatives of these various housing

projects that we had. They had these tenant associations whereby they have a president or spokesperson, and they were telling me that they weren't seeing the cops around; that the cops – the policemen were apparently staying ducked in out of the cold and whatnot.

I told McCoy before I went, I told him – to use the vernacular – to get your troops off their asses. I want them out on the street where they can be seen, I said I want you to get the sergeants moving on them. I want them out there. I don't want them hiding out. I'm

* * *

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**
**WESTERN SECTION**

**Docket no. CA 98-30170-MAP**
**Springfield, MA**

**May 19, 2003**

ROBERT WAGNER )
v. )
CITY OF HLYOKE [sic], et als. )

**TRANSCRIPT OF EVIDENTIARY HEARING HELD**

BEFORE THE HONORABLE MICHAEL A. PONSOR,
UNITED STATES DISTRICT COURT JUDGE

* * *

(Testimony of Daniel Szostkiewicz)

* * *

[47] department.

"Although allegations of inappropriate conduct by senior members of the department-are clearly important matters of public interest, your remarks could also be construed as defamatory.

"I am particularly troubled by your admission that you are in a "personal war" with Chief Donoghue. Also your admission that you went to the press after losing your case against Donoghue and the City in a Labor Relations Commission strongly supports my conclusion that you made many of these statements in an attempt to bring discredit to Chief Donoghue and various members of the department.

"As a prior chief of the department, I am sure you understand the chain of command. It is my belief this chain must be respected and adhered to. In this case it is was not."

Q. All right. What did you mean by chain of command?

A. It's a paramilitary organization. Wherever you are in that chain of command, you have issues, you go to the next highest in command and keep working your way up until you reach the top of that chain to try to gain relief for whatever issue you're raising.

Q. And who was at the top of that chain of command?

A. At the time it was me.

[48] Q. And if an officer was to come to the mayor and was not happy with the result he got there, where would he or she go?

A. I suppose it would depend upon what issue they're dealing with, but there are a variety of different agencies, whether it's the Civil Service Commission, Labor Relations, any of those boards I suppose they could go to.

Q. Or perhaps the press?

A. I would not be upset if somebody went to the press after going through the chain of command and finding no relief. I wouldn't find that unreasonable.

Q. So one of your concerns was the fact that you, as mayor and the rest of the chain of command, didn't have an opportunity to view these issues before it became public knowledge?

A. I was never given a chance to address these issues. I would have absolutely addressed them had I had that opportunity.

Q. Can we have the last page of this?

If you can read this section into the record.

A. "Finally, rather than pursuing other recourses you chose to make these comments to a newspaper, a very public forum with a significant circulation. I particularly note that you did not bring any of those [49] accusations to me as the appropriate authority of the police department.

"I'm obviously very concerned about allegations of misconduct by members of the police department. In going to a reporter you clearly avoided taking any responsible avenue and instead deliberately created a public uproar that besmirched the entire department."

Q. And in the next paragraph you even talk about it being a quasi-military organization, the second sentence?

A. That's correct.

Q. Now, there were other – two other disciplines that arose from Valley Advocate articles, is that correct?

A. Yes, sir.

Q. One involved the release of an arrest report or CORI material; do you recall that?

A. Yes, sir.

Q. That was a five-day suspension that you imposed or upheld I should say?

A. Yes, sir.

Q. And you heard testimony from Captain Paquette, did you not at that hearing?

A. I believe I did, yes.

Q. And do you recall what his testimony was just briefly?

A. To the best of my recollection, he testified as to [50] how Tom Vannah from the Valley Advocate stated he received this protected information.

THE COURT: Right, and keep it particularly in mind that the truth of Mr. Vannah's statement is not before you and that I have deliberately excluded Mr. Vannah from the trial for various reasons or made the decision it would not be appropriate for him to testify.

This is something that this witness recalls hearing said, but you should not necessarily assume that it's true.

Q. (By Mr. Fitz-Gibbon) In fact, in your decision you actually recite what the testimony was, correct?

A. Yes, sir.

Q. If you can read that briefly into the record?

A. "While Captain Paquette was looking at the incident report on the computer screen, Vannah made statements identical to the information contained in the incident report suggesting to Paquette that Vannah had a copy of the incident in front of him.

"Paquette then asked Vannah those booking sheets and arrests that Wagner gave you, right? According to Paquette, Vannah answered yes. You gave no evidence or testimony to the contrary."

Q. Now both Paquette and Wagner testified; correct?

A. Yes, sir.

[51] Q. And you had an opportunity to see and hear them and judge their credibility?

A. I had to weigh their credibility.

Q. And you credited Captain Paquette's testimony?

A. I did.

Q. You relied on what he told you in making your decision?

A. Yes, sir, I did.

Q. And the next two paragraphs you indicate both Captain Paquette and Chief Donoghue said those were CORI materials?

A. That's correct. They both testified to that, yes.

Q. And that testimony was neither contradicted or refuted?

A. That's correct.

Q. And Mr. Wagner testified that he did have the materials but he couldn't offer an explanation as to how Mr. Vannah received those?

A. That's right.

Q. So it was on the basis of that testimony that you believed that a violation of the departmental rules had occurred?

A. Yes.

Q. Releasing confidential information?

A. Yes.

[52] Q. There was a third Valley Advocate discipline, was there not?

A. Yes, there was.

Q. That had to do with a release of a report concerning Arthur Therrien that Chief Donoghue had authored in 1990. Do you recall that?

A. I do, yes.

Q. And this was a five-day suspension which I think you reduced to a three-day suspension, is that correct?

A. I'm pretty sure. I have to see my second paragraph of this letter but I believe that's true.

Q. And the confidential internal affairs report is the Therrien document, correct?

A. Correct.

Q. And in the highlighted section this again explains the origins of that report, correct?

A. Yes, sir.

Q. And if we can go to the next page please?

You credited the testimony of Captain Paquette and Chief Donoghue at the hearing, correct?

A. Yes, sir.

Q. In fact, in the first paragraph of page two you talk about their testimony and you say that their testimony was neither refuted or contradicted?

A. Yes, sir.

[53] Q. And I believe you were asked about the next paragraph, which is not highlighted, by Attorney Graham about the fact that there was an MCAD complaint pending against Mr. Therrien at the time and the documents might have come from those proceedings, is that correct?

A. Yes.

Q. And after hearing all the witnesses and reviewing their testimony, you decided not to credit that or you didn't think that was probable, correct?;

A. That's correct, it was not probable.

Q. And as you can see in the second full paragraph, you did reduce the suspension to three days, is that correct?

A. I did.

Q. And the reasons you did that are stated in that paragraph?

A. Yes, they are.

Q. Okay. Now, there were two other disciplines that you were involved in – well, three but two directly. Do you recall that you – there was a reprimand – I'm sorry. There was a five-day suspension on 10/3/97.

MR. FITZ-GIBBON: If I may, Your Honor?

THE COURT: You may.

Q. (By Mr. Fitz-Gibbon) I'm not sure you can see this.

A. I can see it.

Q. There was a five-day suspension reduced to one day

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| ROBERT WAGNER AND MARGARET WAGNER | ) | CIVIL ACTION NO. 98-30170-MAP |
| v. | ) | |
| CITY OF HOLYOKE, ET AL | ) | |

SPECIAL VERDICT FORM

May 29, 2003

We the jury unanimously respond to the following questions:

I. LIABILITY

A. FEDERAL CIVIL RIGHTS STATUTE

1. Has the plaintiff Robert Wagner proven by a preponderance of the evidence that the defendant City of Holyoke, pursuant to a custom or policy, violated his civil rights by retaliating against him for protected speech through adverse employment action?

no
Yes or No

If you answered "yes" to question I.A.1. proceed, if you answered "no" stop and go on to Question I.A.3.

2. Has the defendant City of Holyoke proven by a preponderance of the evidence that it would have taken the same adverse employment action against the plaintiff Robert Wagner, even he had never made the protected statements?

_____
Yes or No

3. Has the plaintiff Robert Wagner proven by a preponderance of the evidence that the City of Holyoke, through its custom or policy, violated his civil rights by retaliating against him for protected speech through severe harassment?

yes
Yes or No

B. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

1. Has the plaintiff proven by a preponderance of the evidence that the defendant Stephen Donoghue maliciously and intentionally interfered in Robert Wagner's contractual relations with the City of Holyoke?

no
Yes or No

2. Has the plaintiff proven by a preponderance of the evidence that the defendant Marc Cournoyer maliciously and intentionally interfered in Robert Wagner's contractual relations with the City of Holyoke?

no
Yes or No

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

1. Has the plaintiff proven by a preponderance of the evidence that the defendant Stephen Donoghue intentionally inflicted severe emotional distress on Robert Wagner?

no
Yes or No

2. Has the plaintiff proven by a preponderance of the evidence that the defendant Marc Cournoyer intentionally inflicted severe emotional distress on Robert Wagner?

no
Yes or No

II. DAMAGES – ROBERT WAGNER

A. FEDERAL CIVIL RIGHTS STATUTE

1. If you have found the defendant City of Holyoke liable for a violation of the federal Civil rights statute by answering "yes" to Question I.A.1. and "no" to Question I.A.2., or "yes" to Question I.A.3.,what is the amount of money you award the plaintiff to compensate him for the injury he sustained as a result of this violation?

One Dollar
(in words)

$ 1.00 (in figures)

B. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

1. If you have found the defendant Stephen Donoghue liable for intentional interference with contractual relations by answering "yes" to Question I.B.1., what is the amount of money you award to the plaintiff to compensate him for the injury he sustained as a result of this conduct?

(in words)

$_____ (in figures)

2. If you have found the defendant Marc Cournoyer liable for intentional interference with contractual relations by answering "yes" to Question I.B.2., what is the amount or money you award to the plaintiff to compensate him for the injury he sustained as a result of this conduct?

_____

(in words)

$_____ (in figures)

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

1. If you have found the defendant Stephen Donoghue liable for intentional infliction of emotional distress by answering "yes" to Question I.C.1., what is the amount of money you award to the plaintiff to compensate him for the injury he sustained as a result of this conduct?

_____

(in words)

$_____ (in figures)

2. If you have found the defendant Marc Cournoyer liable for intentional infliction of emotional distress by answering "yes" to Question I.C.2., what is the amount of money you award to the plaintiff to compensate him for the injury he sustained as a result of this conduct?

_____

(in words)

$_____ (in figures)

Note: Remember, if you award damages, they should not be duplicated.

D. TOTAL DAMAGES TO ROBERT WAGNER.

What is the total amount of damages, if any, that you intend to award the plaintiff Robert Wagner for all claims, against all defendants? (Please total all damages).

_____

(in words)

$_____ (in figures)

III. LOSS OF CONSORTIUM – MARGARET WAGNER

If you answered "yes" to Question I.B.1., I.B.2., I.C.1. *or* I.C.2., proceed to the next question. If you answered no to Questions I.B.1., I.B.2., I.C.1. *and* I.C.2. stop.

1. Has the plaintiff Margaret Wagner proven by a preponderance of the evidence that the defendant Stephen Donoghue's intentional interference with contractual relations and/or intentional infliction of emotional distress caused her to suffer a loss of consortium?

no
Yes or No

2. Has the plaintiff Margaret Wagner proven by a preponderance of the evidence that the defendant Marc Cournoyer's intentional interference with contractual relations and/or intentional infliction of

emotional distress caused her to suffer a loss of consortium?

no
Yes or No

If your answer to Question III.1. or III.2. is "yes," go to Question 3. If your answer to Questions III.1. and 111.2. is "no," stop.

3. What is the total amount of money that will reasonably and fully compensate plaintiff Margaret Wagner for the loss of consortium she sustained as a result of one or both of the Individual defendants' intentional interference with contractual relations and/or intentional infliction of emotional distress?

_____
(in words)

$_____
(in figures)

/s/ Leah P. Gay
Foreperson

6-4-03
Date

[LOGO]

HON.
DANIEL J. SZOSTKIEWICZ

MAYOR,
CITY OF HOLYOKE

DEPARTMENT OF POLICE

MARC A. COURNOYER
CHIEF OF POLICE

[Address Omitted In Printing]

3 August 1998

Sgt Robert Wagner
7 Cranberry Drive
Holyoke, Mass. 01040

Sgt Wagner:

You are hereby notified that pursuant to the powers conferred in me by the Mass. General laws, Chapter 31, section 41, I am suspending you for a period of three (3) days without pay, effective August 10th, 11th and 14th, 1998.

The specific reasons for this suspension is for the violations of Department Rules and Regulations, as they pertain to the releasing of departmental records without proper authority and releasing other documents that were ordered expunged from department records. Specifically you disseminated false and misleading remarks in a complaint to the Labor Relations Commission, regarding Lt. Eva O'Connell, in direct violation of the court order and department Rules and Regulations:

1.24: Officers shall not publicly criticize or ridicule the Department, its policies, or other officers by speech, writing or other expression, where such speech, writing or other expression is defamatory, obscene, unlawful is intended to undermine the effectiveness of the Department, is insubordinate or is made with reckless disregard for truth or falsity.

1.26: A member or an employee of the Department shall not criticize any other member or employee, except in the line of duty as a superior to a subordinate, nor shall the member or employee maliciously gossip about any superior, order, policy, procedures, case, or event, nor shall a member or employee cause to discredit, lower, or injure the morale of the department or that of any individual of the Department.

1.30: Officers shall treat the official business of the Department as confidential. Information regarding official business shall be disseminated only to those for whom it is intended, in accordance with established departmental procedures. Officers shall not divulge the identity of persons giving confidential information except as authorized by proper authority.

In as much as discipline should not only be progressive, but it should also reflect the seriousness of the violations you are charged with committing, and as you have been given a written reprimand, regarding these violations, on May 18th, 1998, in Case #CF-23-97, I believe a three (3) day suspension is appropriate.

Additionally, being as you are co-author of this Labor complaint, you also bear some responsibility for it's false and malicious contents.

Finally, I am informing you that the attached Rules and Regulations that are cited, herein exist not only to show you what Rules were violated, but they are also there for you to become more familiar with their contents, so that you will have a better working knowledge of these Rules and Regulations, that govern your behavior as a member of the Holyoke Police Department.

You may file a counter statement. You have a right within forty-eight (48) hours of receipt of this notice, to request, in writing, a hearing by the appointing authority Mayor Daniel J. Szostkiewicz, That hearing will be on the question of whether there was just cause for the suspension. If you request such a hearing, it will be held within 5 days of the receipt of such request by the Appointing Authority, or a hearing officer designated by him. Always disregard Saturday, Sunday and Holidays when computing time.

I am enclosing herewith a copy of Mass. General Laws, Chapter 31, Section 41, 41a, 42, 43, 44 and 45.

/s/ Marc A. Cournoyer
MARC A. COURNOYER
Chief-of-Police

[LOGO]

HON.
DANIEL J. SZOSTKIEWICZ

MAYOR,
CITY OF HOLYOKE

[Address Omitted In Printing]

March 18, 1997

Robert Wagner
7 Cranberry Drive
Holyoke, MA 01040

Re: Appeal; G.L. c. 31, § 41 [Five (5) Day Suspension dated March 4, 1997 (CORI)]

Dear Sgt Wagner:

On March 10, 1997, you appeared before me with counsel for the purpose of appealing, pursuant to G.L. c. 31, § 41, the five (5) day suspension imposed by Chief Stephen Donoghue on March 3, 1997. The suspension pertains to your giving Thomas Vannah, a reporter for the Advocate, a weekly newspaper, a CORI protected document in violation of the G.L. c. 6, § 178 and the Rules and Regulations of the Holyoke Police Department.

For the reasons discussed below, I find that the five (5) day suspension is adequately supported by just cause.

In the Advocate article of February 27, 1997, it states "last November, at the request of the AG's office, Wagner pulled up the reports on the arrest he had made with Thomas and Zeveska on October 13, 1995." At the hearing, you admitted to obtaining the Incident Report at the request of the Attorney General's office. You also admitted that all of the statements and quotes attributable to you in the

article are accurate. The article included quotes directly from the Incident Report and discussed the arrest in question in considerable detail.

Captain Paquette testified that on October 25, 1996, prior to the publication of the article, he discussed the arrest in question with Mr. Vannah on the telephone. Captain Paquette stated that during his discussion with Mr. Vannah, Sgt. Eva O'Connell had pulled the Incident Report in question up on the computer screen. Sgt. O'Connell was in the room during Capt. Paquette's conversation with Mr. Vannah. While Capt. Paquette was looking at the Incident Report on the computer screen, Vannah made statements identical to information contained in the Incident Report suggesting to Paquette that Vannah had a copy of the Incident Report in front of him. Paquette then asked Vannah "Those are booking sheets and arrest reports that Wagner gave you, right?" According to Paquette, Vannah answered "Yes." You gave no evidence or testimony to the contrary.

Both Captain Paquette and Chief Donoghue testified that the Incident Report is protected under the CORI law, thus making it unlawful to disseminate the report to the public. This testimony was neither contradicted nor refuted.

Under cross-examination, you admitted having the Incident Report, but denied giving the Incident Report to Mr. Vannah. Moreover, you could not offer any explanation as to how Mr. Vannah could have gotten this Report.

Based on the evidence and documents presented to me at the hearing, I find that you did disseminate the Incident Report in violation of the law and paragraphs 1.6, 1.24 and 1.26 of the Rules and Regulations of the Department and Special Order 896, as stated in Chief Donoghue's letter

dated March 3, 1997. In reaching this conclusion, I am persuaded that Capt. Paquette testified truthfully regarding his conversation with Mr. Vannah. Moreover, you admitted that you went to the press after you lost your labor relations case against Donoghue and the City in January 1997, and after you failed to receive any support from your own Union, the District Attorney's Office, the Attorney General's Office, the Labor Relations Commission and the State Ethics Commission. Your admission that you possessed this Incident Report, together with your statements that you are in a "personal war" with Chief Donoghue, supports the conclusion that you sought to use the report to bring discredit to Chief Donoghue and various members of the department.

With regard to the severity of the discipline, the five (5) day suspension should reflect the seriousness of the misconduct and follow the principle of progressive discipline. I note that you have been disciplined in the past:

> On June 13, 1996, you received a written reprimand for allowing another officer to leave his duties at the height of a major fire and in submitting an untrue report on the details of the matter.
>
> On October 2, 1996, you received a written reprimand for conducting personal business while on duty.

You have also admitted to having notices of sick leave abuse in your personnel file. Considering your history presented at this hearing, I find the five (5) day suspension is consistent with the principle of progressive discipline. I will refrain, contrary to Chief Donoghue's request, from any further consideration of more severe disciplinary

action against you related to this incident. My decision not to consider any further disciplinary action is based on my determination that this five (5) day suspension, together with the other disciplinary actions against you issued today, will serve as an appropriate vehicle for corrective action and send a strong message that this type of misconduct will not be tolerated in the future. Given your prior management position in the Department, I am sure you understand the importance of the Holyoke Police Department Rules and Regulations. It is these rules that maintain the vitality of our Department.

You may appeal this decision to the Civil Service Commission as provided in G.L. c. 31, § 43 within ten (10) days after receiving this letter. Copies of G.L. c. 31, §§ 41-45 are enclosed for your review.

Respectfully,

/s/ Daniel J. Szostkiewicz
Daniel J. Szostkiewicz
Mayor

cc: Daniel Glanville, City Solicitor
Michael J. Ackerson, Esq.
Edward Mitnick, Esq.
Chief Stephen Donoghue

[LOGO]

HON.
DANIEL J. SZOSTKIEWICZ

MAYOR,
CITY OF HOLYOKE

[Address Omitted In Printing]

March 18, 1997

Robert Wagner
7 Cranberry Drive
Holyoke, MA 01040

Re: Appeal; G.L. c. 31, § 41 [Five (5) Day Suspension dated March 4, 1997 (*Internal Affairs Report*)]

Dear Sgt. Wagner:

On March 10, 1997, you appeared before me with counsel for the purpose of appealing, pursuant to G.L. c. 31, § 41, the five (5) day suspension imposed by Chief Stephen Donoghue on March 4, 1997. The suspension pertains to your giving a reporter for the Advocate, a weekly newspaper, a confidential Special Internal Affairs Report in violation of the Rules and Regulations of the Holyoke Police Department.

For the reasons discussed below, I find that just cause exists to support disciplinary action. However, I find that the five (5) day suspension should be reduced to three (3) days.

The Advocate article of February 13, 1996, contains considerable discussion of information contained in a 1990 "special report" prepared by then Deputy Chief Stephen Donoghue regarding the actions of Officer Arthur Therrien. The quotes and statements printed in the article

clearly came from the Special Report, introduced at the hearing, prepared by Donoghue on December 11, 1990.

Captain Paquette, who was Chief of Police when the report was prepared, testified that Donoghue prepared this report as part of an internal investigation of a complaint filed by Therrien against Donoghue. Paquette testified that the report is kept in the Internal Affairs files. Capt. Paquette further stated that only the Police Chief has access to these files. Chief Donoghue corroborated this testimony. Therefore, arguably only Paquette, Donoghue and yourself, as the three individuals who have served as Chief of Police since the report was prepared, could have had access to this file and, hence, this Special Report. In addition, Chief Donoghue cited the Special Report which states "in accordance with Local #409 contract Paragraph 20.3, this response is to be filed only in the 1. Internal Affairs file case against myself and in 2. my personal file."

Both Chief Donoghue and Capt. Paquette testified that the dissemination of this Special Report, because it was contained in a confidential in [sic] nature, would constitute a violation of the Rules and Regulations of the Department. This testimony was neither contradicted nor refuted.

At the hearing, Capt. Paquette and Chief Donoghue both denied disseminating the Special Report to the Advocate. I find their testimony credible. You likewise denied giving the Special Report to the Advocate. As to possible explanations as to how this report got into the hands of the Advocate, you hypothesized that it could have been obtained from the MCAD file involving Therrien or perhaps from the attorneys involved in that matter. Although this

scenario is possible, based on the evidence presented to me at the hearing, I find that it is not probable.

You admitted that all of the disparaging statements and quotations attributable to you in February 6, February 13, and February 27, 1997, articles in the Advocate were accurate. You also admitted that you are in a "personal war" with Chief Donoghue. Finally, you admitted that you went to the press after you lost your labor relations case against Donoghue and the City in January 1997, and after you failed to receive any support from your own Union, the District Attorney's Office, the Attorney General's Office, the Labor Relations Commission and the State Ethics Commission. You even testified that the Union-News newspaper was part of some "conspiracy." These admissions strongly support the conclusion that you sought to use the Special Report to bring discredit to Chief Donoghue, Officer Therrien and various members of the department. I, therefore, find that you violated, as stated in Chief Donoghue's disciplinary letter dated March 4, 1997, paragraphs 1.6, 1.24, 1.26, 1.95, 1.71, 1.58, 1.130 of the Rules and Regulations of the Department and Special Order Number 896.

With regard to the severity of the discipline, the suspension should reflect the seriousness of the misconduct and follow the principle of progressive discipline. I note that you have been disciplined in the past:

> On June 13, 1996, you received a written reprimand for allowing another officer to leave his duties at the height of a major fire and in submitting an untrue report on the details of the matter.

> On October 2, 1996, you received a written reprimand for conducting personal business while on duty.

You have also admitted to having notices of sick leave abuse in your personnel file. Considering your history of misconduct, I find that a three (3) day suspension is consistent with the principle of progressive discipline.

My determination that the suspension should be reduced from five (5) to three (3) days is based on the following. First, although the specific details in the report may not have been previously disseminated, Chief Donoghue's opinions of Officer Therrien's actions are generally a matter of public record. Therefore, the release of this document would not create a public uproar or dissension within the department, unlike the strife raised by your other comments printed in the Advocate. Second, the dissemination of the Special Report is not as damaging or as unconscionable as the release of the CORI document that warranted a five (5) day suspension as discussed in a separate disciplinary letter issued on this date. Finally, I believe that a three (3) day suspension together with the other disciplinary actions against you issued today, will serve as an appropriate vehicle for corrective action and send a strong message that this type of misconduct will not be tolerated in the future.

You may appeal this decision to the Civil Service Commission as provided in G.L. c. 31, § 43 within ten (10) days

after receiving this letter. Copies of G.L. c. 31, §§ 41-45 are enclosed for your review.

Respectfully,

/s/ Daniel J. Szostkiewicz
Daniel J. Szostkiewicz
Mayor

cc: Daniel Glanville, City Solicitor
Michael J. Ackerson, Esq.
Edward Mitnick, Esq.
Chief Stephen Donoghue

FILED
SEP 29 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-234

# In the Supreme Court of the United States

ROBERT WAGNER,
*Petitioner*,

v.

CITY OF HOLYOKE, MASSACHUSETTS, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for First Circuit**

## PETITIONER'S REPLY BRIEF

STEWART T. GRAHAM, JR.
*Counsel of Record*

GRAHAM & GRAHAM
39 BURLEIGH ROAD
HAMPDEN, MA 01036
(413) 781-4342

*Counsel for Petitioner*

Becker Gallagher Legal Publishing, Inc. 800.890.5001

## QUESTIONS PRESENTED

1. Whether a municipality can justify disciplining a police officer for engaging in constitutionally protected conduct by asserting an affirmative defense that the protected conduct violated a departmental regulation after its interest in enforcing those regulations has been ruled subordinate to the officer's and the public's First Amendment interests in the conduct?

2. Whether municipal officials can be granted qualified immunity against claims they retaliated against a police officer for his engaging in constitutionally protected conduct without assessing the officials' motive or intent in taking the challenged actions against the officer, where such motive or intent is an element of the constitutional tort alleged?

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF CITED AUTHORITIES . . . . . iii

REASONS FOR GRANTING THE WRIT . . . . . 1

I. Review is necessary to resolve a conflict between this Court's precedents and the decision of the Court of Appeals for the First Circuit regarding the First Amendment rights of public employees and between the First Circuit and the other Courts of Appeal . . . . . 1

II. In cases involving constitutional torts which require proof of unconstitutional motive or intent, the availability of qualified immunity must be considered in terms of whether a reasonable official acting with that unconstitutional motive or intent would know he was violating the plaintiff's constitutional rights . . . . . 6

CONCLUSION . . . . . 10

## TABLE OF CITED AUTHORITIES

Cases:

*City of Newport v. Fact Concerts*,
453 U.S. 247 (1981) . . . . . 9

*Crawford-El v. Britton*,
523 U.S. 574 (1998) . . . . . 6, 7, 8

*Hanneman v. Breier*,
528 F.2d 750 (7th Cir. 1976) . . . . . 4, 5

*Harlow v. Fitzgerald*,
457 U.S. 800 (1982) . . . . . 9

*Locurto v. Safir*,
264 F.3d 154 (2d Cir. 2001) . . . . . 7, 8

*Mt. Healthy City School District Board of Education v. Doyle*,
429 U.S. 274 (1977) . . . . . 2, 3, 6

*Myers v. Hasara*,
226 F.3d 821 (7th Cir. 2000) . . . . . 4, 5, 8

*O'Brien v. Town of Caledonia*,
748 F.2d 403 (7th Cir. 1984) . . . . . 5

*Pickering v. Board of Education*,
391 U.S. 563 (1968) . . . . . 1, 2, 4, 5, 6

*Solomon v. Royal Oak Township*,
842 F. 2d 862 (6th Cir. 1998) . . . . . 5

*Thomas v. Talley*,
251 F.3d 743 (8th Cir. 2001) . . . . . 8

*Wagner v. City of Holyoke*,
404 F.3d 504 (1st Cir. 2005) . . . . . 8, 9

*Wagner v. City of Holyoke*,
241 F. Supp. 2d 78 (D. Mass. 2003) . . . . . 8

## INTRODUCTION

The Respondents' brief in Opposition to the Petition demonstrates why this Court should grant the Petition to reaffirm and to clarify the principles governing public employees' First Amendment rights. The Court of Appeal's decision on which the Respondents rely constitutes a diminution of those rights through a retrenchment from the principles established by this Court. Second, the Respondent's brief demonstrates the conflict between this Court's precedent, decisions of other Courts of Appeal, and the decision in this case. The Petition should be granted in order to establish clearly the role a public officer's intent or motivation plays in determining whether that officer is entitled to qualified immunity against a claim of retaliation for exercising First Amendment rights.

## REASONS FOR GRANTING THE WRIT

### I. Review is necessary to resolve a conflict between this Court's precedents and the decision of the Court of Appeals for the First Circuit regarding the First Amendment rights of public employees and between the First Circuit and the other Courts of Appeal

#### A. Once an employer's interests in enforcing its disciplinary rules has been weighed in step two of the *Pickering* analysis and been held subordinate to the first amendment rights involved, those interests cannot be reasserted as an affirmative defense

The Petition in this case does, as the Respondents correctly state, (Resps.' Br. at 2), present the question as to the proper application of this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Mt. Healthy*

*City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). But, contrary to the Respondent's assertion, (Resps.' Br. at 4) the Petitioner Wagner does not contend that that the issue of causation is foreclosed once conduct is held protected by a court per *Pickering*. Sgt. Wagner asserted that causation in this case was established by the disciplinary documents and the testimony of the Defendant's officials. (Apps. E and F) Sgt. Wagner asserts that the issue in disputes is whether once an employee's conduct is held to be constitutionally protected per *Pickering*, the employer's interests that were weighed in step two of the *Pickering* analysis can be reasserted as an affirmative defense.

There is no metaphysical separation between Sgt. Wagner's protected conduct and the asserted violation of disciplinary rules as the Respondent and the lower court asserted. Sgt. Wagner's protected conduct is set out at Appendices E and F; it is precisely that conduct for which the Respondents assert Sgt. Wagner was disciplined. (Resps.' Br. at 1) There is no dispute about the reasons for the discipline imposed; the disciplinary letters are specific (App. E); as is the testimony of the officials who imposed the discipline. (App. F) It should be noted here, that the testimony on this issue to which the Respondents cite in their opposition, is from the evidentiary hearing held per *Pickering*; it is not from the trial. (Resps.' Br. at 2) The trial testimony on this issue is reproduced in Appendix F to the Petition. The parties dispute whether it is legitimate per *Pickering* and *Mt. Healthy* to impose discipline for conduct alleged to violate rules and regulations when it is that very conduct which is constitutionally protected. Sgt. Wagner asserts that the public employer's interest in enforcing its disciplinary rules is considered and weighed against the employee's First Amendment rights in step two of the *Pickering* test. Once the employee's First Amendment interests are held to outweigh

the employer's interests in enforcing its disciplinary rules, those rules cannot be used to justify the discipline. When a court rules the employee's conduct is constitutionally protected, the employer can defend only by showing a lack of causation or by raising the affirmative defense that had this conduct not occurred, the employee would have been disciplined anyway. *Mt. Healthy*, 429 U.S. at 285-287.

In the instant case, the Respondents' officials testified that the discipline would not have been imposed but for the conduct. (App. F). The Respondents argue that on each occasion they "would have disciplined Sgt. Wagner regardless of the content of his speech." (Resps.' Br. at 5). But the evidence was explicit and uncontradicted that it was Sgt. Wagner's protected conduct that the Respondent City asserted violated its rules and regulations. (Apps. E and F). Thus, had he not engaged in that protected conduct, Sgt. Wagner would not have been disciplined. *Id.* The *Mt. Healthy* affirmative defense requires proof that the adverse employment action would have been taken even if the protected conduct had not occurred, *i.e.*, "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. This Court explained that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-286. Had Sgt. Wagner not engaged in the protected conduct, he would not have allegedly violated the Respondents' regulations, and no discipline would have been imposed. He was placed in a worse position for having engaged in constitutionally protected conduct. That is what *Mt. Healthy* prohibits.

The lower courts' decisions conflict with this Court's authoritative pronouncements on the constitutional standards governing a public employee's exercise of his First

Amendment rights in the workplace. This Court should grant the Writ in order to reassert and to clarify these principles since the First Amendment rights of thousands of public employees are potentially at risk.

**B. The First Circuit's decision in this case conflicts with decisions in the Courts of Appeal for the Sixth and Seventh Circuits which have established the principle that an employer's interest in enforcing its disciplinary rules must be weighed against an employee's first amendment rights and if the employee's rights are predominate no discipline can be imposed**

In his Petition, Sgt. Wagner asserted that the Court of Appeals' decision in this case conflicted with decisions of the Courts of Appeal for the Sixth and Seventh Circuits. (Petition at 13) The Respondents' attempt to distinguish those cases is sterile. *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), held that once a police officer's First Amendment interests are determined to outweigh his department's interests in enforcing its disciplinary regulations in step two of *Pickering*, those departmental interests can not be used to justify discipline. *Id.* at 756. The decision in *Hanneman* transcends the particular facts of the case and cannot be limited as the Respondents attempt to do. (Resps.' Br. at 7) *Hanneman*, stands for the principle that once speech is deemed constitutionally protected per *Pickering*, an employer can not impose disciple because that speech also violated its regulations. That principle was reaffirmed in *Myers v. Hasara*, 226 F.3d 821 (7th Cir. 2000), in which the court held that the constitutional requirement was clearly established as of 1996, that before a police department can impose discipline for violations of its regulations, its interests in enforcing those regulations must be balanced against the officer's First Amendment rights in speaking on matters of

public concern, citing, *inter alia* to *Hanneman*. *Myers* also cited to *O'Brien v. Town of Caledonia*, 748 F.2d 403, 406-07 (7th Cir. 1984), as additional authority. *O'Brien,* in turn, relied on *Hanneman*; and affirmed that a department's disciplinary regulations must be weighed against an officer's First Amendment interests in engaging in the conduct alleged to have violated the department's rules.

In *Solomon v. Royal Oak Township*, 842 F. 2d 862 96th Cir. 1998), the Sixth Circuit decision cited in the Petition, the plaintiff police officer was discharged for "speaking to the press." *Id.* at 864. That is the same ground upon which Sgt. Wagner was disciplined in the instant case. (App. E) The Royal Oak Township argued that the officer's speech, held by the court to be protected, violated several disciplinary rules, including, *inter alia*, violation of the chain of command and confidentiality regulations. The court found that the violation of the chain of command did not cause any disruption in the workplace, thus it did not outweigh the employee's First Amendment interests. *Id.* at 866. On the other alleged violations, the court made two rulings: the officer did not violate them, and the defendant interest in enforcing the rules was outweighed by the First Amendment interests involved. *Id.* The court cited to *Hanneman* as authority. *Id.*

The First Circuit decision in the present case is in direct conflict with *Hanneman, Myers, O'Brien* and *Solomon.* These cases hold that a department's interest in enforcing its rules and regulations must be balanced against the officer's and the public's First Amendment interests. If the latter interests predominate, the rules and regulations cannot be enforced against the officer for engaging in the protected conduct. The court in the instant case held that despite the fact that Sgt. Wagner's conduct was determined to be protected per the *Pickering* analysis, and thus his and the

public's interests in that conduct outweighed the Respondents' interest in enforcing its rules and regulations, the Respondents could nonetheless assert that same interest in enforcing its rules and regulations as an affirmative defense. (App. A at 4a-5a) Sgt. Wagner asserts that the lower courts thereby stripped the constitutional protection extended to his conduct through the *Pickering* analysis. If the conduct is constitutionally protected, it must be protected from something. In this case, Sgt. Wagner's conduct must have been protected against adverse employment actions by the Respondents. That protection cannot be stripped from the conduct under the guise of disciplining the means and not the content. Both the means and the content of Sgt. Wagner's conduct were considered in the *Pickering* analysis, and protection was extended to that conduct by the District Court.

This Court should grant the Petition to clarify and to reassert the principles of *Pickering* and *Mt. Healthy*, which were eviscerated by the First Circuit's decision in this case, and to resolve the conflict created by the First Circuit's decision with decisions of the Courts of Appeal for the Sixth and Seventh Circuits.

**II. In cases involving constitutional torts which require proof of unconstitutional motive or intent, the availability of qualified immunity must be considered in terms of whether a reasonable official acting with that unconstitutional motive or intent would know he was violating the plaintiff's constitutional rights**

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court left unarticulated the question of whether an evaluation of qualified immunity in a case involving alleged First Amendment retaliation must consider the reasonableness of a defendant's action in terms of his intent or motivation. The

dissent believed that the majority assumed a court must do so. *Id.* at 592-594; *see*, Rehnquist, C.J., dissenting at 602. That does appear to be the case, but not definitely so. Thus, the Court should resolve that issue clearly since it affects public officials throughout the country. The issue arises in cases such the instant case, in which the constitutional tort involved requires proof of motive or intent to establish a *prima facie* case. Once the constitutional tort is established, a court then determines the qualified immunity question in terms of that tort. In a retaliation case, the court must ask whether a reasonable official would know that acting with that unconstitutional motive or intent is constitutionally impermissible. *See, Crawford-El*, 523 U.S. at 589-593; *Locurto v. Safir*, 264 F.3d 154, 168 (2nd Cir. 2001) (it can never be objectively reasonable for a government official to act with the intent that is prohibited by law). It is that relationship between motive or intent as an element of the constitutional tort involved, and the issue of qualified immunity that the Court of Appeals failed to acknowledge or to apply. (App. A at 6a); it is also a relationship which the Respondents' do not understand. (*E.g.*, Resps.' Br. at 8-9). The decision in *Locurto*, 264 F.3d at 168-169, demonstrates that Petitioner's reading of *Crawford-El* is proper. In *Locurto* the court stated that the view that "subjective intent is per se irrelevant to the inquiry into objective reasonableness" is based on a "fundamental misconception of the application of the qualified immunity doctrine to constitutional claims for which intent is an element." *Id.* The court held that

> where a more specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law.